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No. 82-5920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KEVIN MICHAEL SHEA,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

REPLY BRIEF OF PETITIONER

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I. STATUS OF A CASE IS A PRIMARY FACTOR IN QUESTIONS OF RETROACTIVITY

Because the State takes the position in its reply brief that status of a case is not a primary factor in determining the retroactivity of an intervening decision, a full discussion on the issue of status is warranted. The *Stovall* factors discussed in Petitioner's original brief on the merits are one approach to the issue of retroactivity. *Stovall* v. *Denno,* 388 U.S. 293 (1967). When applied to this case, those factors warrant retroactive application of *Edwards*

v. *Arizona. Stovall* is not the only or most appropriate approach in this case, however. In outlining the criteria to be used in *Solem,* the Court referred to *Stovall, Linkletter* v. *Walker,* 381 U.S. 618 (1965), *Tehan* v. *Shott,* 382 U.S. 406 (1966), and *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) as authority. Each of those cases arose on collateral review. On the other hand, *U.S.* v. *Johnson,* 457 U.S. 537 (1982), came before the Court on direct review, as does Petitioner. In *Johnson* Justice Blackmun adopted the Harlan approach to retroactivity. That approach consists of applying new rules of constitutional law to cases still subject to direct review by the Court at the time the new decision was rendered. In the absence of a retroactivity question clearly controlled by prior precedents, the Harlan approach resolves the issue in a "principled and equitable manner." 457 U.S. 548. It represents a departure from the "ambulatory" nature of decision-making that has plagued the area of retroactivity and generated a "welter of 'incompatible rules and inconsistent principles.'" *Johnson,* 457 U.S. at 546, quoting from *Desist* v. *U.S.,* 394 U.S. 244, 258 (J. Harlan dissenting). That approach is appropriate in this case.

In *Johnson* the Court addressed the issue of the retroactivity of the decision of *Payton* v. *New York,* 445 U.S. 573 (1980), and held that *Payton* applied to all convictions not yet final at the time it was rendered. The question of retroactivity was not answered by precedent, therefore, the Harlan approach was used.

The question of whether *Edwards* should be given retrospective application is, likewise, not answersd by precedent. Three categories of cases set such precedents and, as evidenced by the Court's decision in

Solem v. *Stumes,* — U.S. —; 104 S.Ct. 1338 (1984), *Edwards* fits into none of these. The first category is those cases which apply established rules of law to new factual situations. In *Solem* the Court held that *Edwards* established a new rule (though Petitioner contends it created a new exception to an established rule), thus removing it from that category. The second class of decisions include those which indicate a "clear break with the past" and are invariable nonretroactive. Though *Solem* held that *Edwards* established a new rule, it also held that "it was not the sort of 'clear break' case that is almost automatically nonretroactive." *Solem,* 104 S.Ct. at 1343. Finally, *Edwards* did not involve the trial court's lack of authority to convict or punish the defendant, the third category.

The Harlan approach thus becomes appropriate, as it was in *Johnson,* for answering the question posed by Petitioner. The concerns originally expressed in Justice Harlan's dissent in *Desist, supra,* would be satisfied. The original understanding of retroactivity first stated in 1801 in *U.S.* v. *Schooner Peggy,* 1 Cranch 103; 2 L.Ed. 49, would be carried on and another step would be taken toward rejecting the "ad hoc approach that has so far characterized [the Court's] decisions in the retroactivity field . . ." *Jenkins* v. *Delaware,* 395 U.S. 213, 224 (1969) (J. Harlan dissenting), quoting in *Johnson,* 457 U.S. at 562.

Application of *Edwards* to cases then pending on direct review would be consistent with the judicial responsibility of doing justice to each litigant on the merits of his own case, another concern voiced in *Desist* and *Johnson.* In both *Edwards* and *Shea,* confessions obtained after the right of counsel had been

invoked were admitted into evidence over defendants' objections. The lower court in *Edwards* was reversed for conduct identical to that of the trial court in the case at bar. To now affirm the Louisiana Supreme Court's refusal to apply *Edwards* would be a violation of the governing constitutional principles reaffirmed by Justice Blackmun in *Johnson:*

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very argument we have embraced.

457 U.S. at 555, quoting *Desist,* 394 U.S. at 259.

The unfairness of treating similarly situated defendants differently would be obliterated by application of the Harlan approach. Like Petitioner, Edwards was interrogated prior to the rule established in *Edwards v. Arizona.* He received the benefits of the rule; Petitioner should be afforded the same.

The principles applied in *Johnson* were mentioned in a footnote to the Court's opinion in *Solem.* Referring to the "slightly different approach" of *Johnson,* the Court found it to be inapplicable because, unlike *Johnson, Solem* arose on collateral review. 104 U.S. at 1341, N.3. Petitioner comes before this Court in the same posture as *Johnson,* on direct review. It is apparent that the principles of *Johnson* should apply herein.

II. LIMITED RETROSPECTIVE APPLICATION OF EDWARDS V. ARIZONA WOULD NOT HAVE A SIGNIFICANT IMPACT ON THE ADMINISTRATION OF JUSTICE

In Petitioner's original brief on the merits, it was argued that the criminal justice system would feel only a minimal effect from a decision by the Court holding *Edwards* v. *Arizona* retroactive to cases pending on direct review at the time it was rendered. Reference was made to several state and federal decisions which had either specifically held that *Edwards* was retroactive or applied *Edwards* to factual situations arising prior to the decision without discussion of the retroactivity issue. As a supplement to the original brief, the following cases exhibit other jurisdictions which have likewise applied *Edwards* retroactively. In *State* v. *Monroe,* 645 P.2d 363 (Idaho Sup. Ct. 1982) and *State* v. *Blakney,* 641 P.2d 1045 (Mont. Sup. Ct. 1982), the cases came before the courts on remand from the Court. Both cases had been sent back, after writs of certiorari had been granted, for reconsideration in light of *Edwards. Edwards* was applied in both without discussion of retroactivity. Courts in Hawaii, Kansas, Nevada, Delaware, Maryland, Wyoming, Alabama, and Mississippi have also applied *Edwards* to factual situations arising prior to May, 1981, without discussion on the issue of retroactivity. *State* v. *Brezee,* 657 P.2d 1004 (Hawaii 1983); *State* v. *Carty,* 644 P.2d 407 (Kansas 1982); *Ludwig* v. *State,* 634 P.2d 664 (Nev. 1981); *Boyer* v. *State,* 436 A.2d 1118 (Del. 1981); *Bryant* v. *State,* 431 A.2d 714 (Md. App. 1981); *Daniel* v. *State,* 644 P.2d 172 (Wyo. 1982); *Warrick* v. *State,* 409 So.2d 984 (Ala. App. 1982); *Davis* v. *State,* 406 So.2d 795 (Miss. 1981).

Thus far it appears that only two jurisdictions have specifically rejected retroactivity of *Edwards*—Louisiana and New Jersey. *State* v. *Shea,* 421 So.2d 200 (La. 1982) and *State* v. *McCloskey,* 446 A.2d 1204 (N.J. 1982). Because of the number of jurisdictions that already applied *Edwards* and the fewer number of cases that were on direct appeal as opposed to collaterial review in May, 1981, any impact on the administration of criminal justice resulting from a decision adopting Petitioner's position will be almost virtually non-existent.

Respectfully submitted,

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